MAR 25 1980

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1496

ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., AMERICAN ADVERTISING FEDERATION, and TOY MANUFACTURERS OF AMERICA, INC.; and KELLOGG COMPANY, INTERVENOR,

Petitioners,

v.

FEDERAL TRADE COMMISSION, MICHAEL PERTSCHUK, CHAIRMAN, PAUL RAND DIXON, DAVID A. CLANTON, ROBERT PITOFSKY, and PATRICIA BAILEY, COMMISSIONERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March 26, 1980

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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. ____

ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., AMERICAN ADVERTISING FEDERATION, AND TOY MANUFACTURERS OF AMERICA, INC.; AND KELLOGG COMPANY, INTERVENOR,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Association of National Advertisers, Inc., American Association of Advertising Agencies, Inc., American Advertising Federation, and Toy Manufacturers of America, Inc. pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 27, 1979.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit reversing an order of the district court and reinstating Federal Trade Commission Chairman Michael Pertschuk for further participation in the children's advertising rulemaking proceeding is not yet reported and is printed in the Appendix ("A") hereto at A-1 - A-99.

The judgment of the District Court for the District of Columbia enjoining Chairman Pertschuk from participation in the children's advertising rulemaking proceeding is reported at 460 F. Supp. 996 and is printed at A-100 - A-110.

The order of the Federal Trade Commission denying a petition to disqualify Chairman Pertschuk is unreported and is printed at A-111 - A-112. Chairman Pertschuk's letter response to petitioners' request that he recuse himself, also unreported, is printed at A-113 - A-126.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 27, 1979. This petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

Although Chairman Pertschuk voluntarily recused himself from the rulemaking proceeding on January 7, 1980,

(the text of his statement is printed at A-221 - A-224) that action has not mooted the controversy (see discussion at pp. 39 - 42, infra).

Questions Presented For Review

1. Whether a disqualification standard applicable to Commissioners in a proceeding under Section 18 of the Federal Trade Commission Act that allows disqualification only upon a "clear and convincing showing" of "an unalterably closed mind" on "critical" matters meets the requirements of a "fair determination" embodied in administrative due process and the Act.

2. Whether, because of a prejudgment of factual issues revealed by his public and private statements, Chairman Pertschuk must be disqualified from participation in the children's advertising proceeding in order to provide petitioners and others with a fair rulemaking and to safeguard the integrity of the administrative process together with the public appearance thereof and confidence therein.

Statutory Provisions Involved

The principal statutory provisions involved in this case are sections 5 and 18 of the Federal Trade Commission Act, 15 U.S.C. §§45, 57a. These are set forth at A-127 - A-140.

Statement of the Case

Introduction

The Federal Trade Commission in 1978 commenced a major trade regulation rulemaking proceeding which could result in a total ban of television advertising to young children, a ban or partial ban of advertising of certain products to children, or governmentally mandated messages imposed as part of the petitioners' commercial speech. The questions presented for review, therefore, take on added intensity and importance because the rulemaking proceeding involves rights of free speech guaranteed by the First Amendment.

Petitioners, representing manufacturers and advertisers of certain of the affected products and the advertising agency business, after petitions to Chairman Pertschuk and the Commission were denied, brought an action for a declaratory judgment and to enjoin Commission Chairman Michael Pertschuk from participating in the children's advertising proceeding alleging that he had prejudged factual issues material to the rulemaking and had fully assumed the role of advocate for a ban of certain children's television advertising. The federal district court enjoined further participation by the Chairman because he had "conclusively prejudged" factual issues which will be necessary for a "fair determination of the rulemaking as a whole." (A-106.) On December 27, 1979 a divided Court of Appeals reversed the district court's order. Petitioners seek certiorari because Chairman Pertschuk by his conduct has violated petitioners' right to a fair rulemaking determination, a right implicit under

the Constitution of the United States and explicit under the Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2193, 15 U.S.C. §57a (1975).

A. Commencement of the Children's Advertising Rulemaking Proceeding

By Notice of Rulemaking dated April 27, 1978 (A-141 - A-169), the Commission invited comment on possible trade regulation rules that would:

> (a) ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;
>
> (b) ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;
>
> (c) require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by the advertisers.
>
> (43 Fed. Reg. 17969; A-152 - A-153.)

The Notice declared that the rulemaking would utilize expedited procedures as a "procedural experiment," and announced the Commission's determination "to provide for designation of the presiding officer by the Chairman." (43 Fed. Reg. at 17968; A-145 - A-146.)

The Commission announced fifteen "general questions and issues of fact" about which it "particularly desires comment." 43 Fed. Reg. at 17969; A-154 - A-159. Among these are questions concerning the age at which children can understand the selling purposes of advertising; the fairness of advertising directed to or seen by children unable to understand its selling purpose and the correct definition of "directed to or seen by"; the possible causal connection between advertising of sugared products and tooth decay in children; and the nature and extent of the awareness of children at various ages of the impact on their dental health and nutrition of consumption of sugared products.

B. Evidence of Chairman Pertschuk's Prejudgment

During an eight-month period from June 27, 1977 to January 30, 1978, Chairman Pertschuk made eleven separate statements on the subject of children's television advertising. (These state-

ments are printed in full at A-170 - A-219.) They were made in a variety of contexts including press and television interviews, speeches, and in correspondence with a U.S. Senator, the Chairman of the Federal Communications Commission, a Commissioner of the Food and Drug Administration, and a member of the press. Throughout the period, they reveal an identifiable evolution of the Chairman's thought from early expressions of concern about children's television advertising to, by November 17, 1977, an emphatic declaration of firm "conviction" that "children's advertising is inherently unfair." (A-206.) The Chairman's statements demonstrate that he had reached dispositive conclusions as to critical issues of fact on which evidence was to be adduced in the course of the rulemaking, e.g., that children do not understand the purposes of advertising, that they cannot appreciate affirmative disclosures in advertising, that they are threatened with tooth decay and malnutrition by advertising of sugared products, and that advertising to them "injects unconscionable stress into the parent-child relationship." (A-195.) The Chairman's statements demonstrate a bias against advertisers as, in his own words, "manipulators" and "exploiters" possessed of "moral myopia." (A-186, A-189 - A-191.)

Chairman Pertschuk's thorough prejudgment was accompanied by a commitment to take action which transformed him into an advocate for his cause, a

role which he pursued by articulating a strategy to attain the adoption of a rule, enlisting the assistance of others in the preparation of a case, decreeing the development of special rules to govern the rulemaking proceeding, and propagandizing with the press and various sectors of the public. The more egregious of the Chairman's statements are set forth below.

1. The "Today Show" Interview, October 31, 1977

Some early expressions of factual prejudgment were made by Chairman Pertschuk on the October 31, 1977, telecast of the "Today Show". (A-177.)

While the Chairman's previous statements respecting children's vulnerability and the unfairness of children's advertising (A-172, A-175) had been tempered by the word "may," by October 31, 1977, that subjunctive word had been omitted from his pronouncements.

In that interview, in response to a question concerning the Commission's authority to regulate possibly deceptive or misleading advertisements for pork chop cooking mix, the Chairman added:

> For example, we're looking now at the question of whether [the term "unfair"] ought to be used to apply to children's advertising, which, in many respects, we think pose [sic] some serious problems. (A-180.)

Shortly thereafter, when asked "what's being done about advertising on TV for children," he responded: "Well, I'm glad you asked the question. It's an area of prime concern to me and to the Commission itself." (A-182.) He continued:

> I have some serious doubt as to whether any television advertising should be directed at a three or four or five year old, a preschooler. They're not competent to understand the nature of the message. We've never treated children as commercial objects in our society. And of course, print advertising only reaches those who can read. But television advertising in the home, directed to children, is a new phenomenon in our society, and I think a troublesome one. (Id., emphasis added.)

In answer to a question as to whether he would like to see the Federal Trade Commission ban children's advertising altogether he replied "not necessarily. But we've not excluded the possibility of bans on certain advertising of certain products to children." (A-183.) Chairman Pertschuk went on to say:

> The Trade Commission has not, as a body . . . yet approached the question of the remedy for the evils we see in children's advertising. We'll do that next month. (Id., emphasis added.)

The remarks quoted above demonstrate at a minimum that Chairman Pertschuk had already concluded that preschool children are incompetent to understand the nature of a television advertising message and that children's television advertising is an "evil" in need of remedy. In the Chairman's mind, as of October 31, 1977 the only question still open for the Commission's consideration appears to have been the fashioning of the correct remedy.

2. The Speech before the Research Conference of Action for Children's Television, November 8, 1977

Not long thereafter, speaking before the Research Conference of Action for Children's Television (ACT), the nation's foremost proponent of restrictions on children's advertising,* Chairman Pertschuk referred in his opening sentence to "the moral myopia of children's television advertising." (A-187.) After stating that "to a young child, TV is a trusted companion," he cited a study which allegedly demonstrated that "many children have only a minimal understanding of TV advertising" and concluded that "advertisers seize upon the child's trust and exploit it as a weakness for

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*ACT is referred to in the Children's Advertising Notice of Rulemaking as one of the filers of petitions upon which the "Commission's determination to commence this rulemaking proceeding arises . . .". (43 Fed. Reg. 17968; A-146.)

their gain." (A-189.) The Chairman rejected the concept of labeling advertisements as such because:

> [e]ven if a disclosure were made of the commercial nature of the message, the youngest children simply would not understand. (A-189 - A-190.)

Commenting on the methods used by advertisers, he said:

> T.V. commercials to children rarely try to communicate the rational objective merits of products. Instead, using sophisticated techniques like fantasy and animation, they manipulate children's attitudes. (A-190, emphasis added.)

The Chairman then related the legal concept of unfairness to special legal doctrines applicable to children, stating as foremost among them that "commercial exploitation of children is repugnant to a civilized society." (A-191.) He went on to argue:

> Why isn't this principle applicable to television advertising directed at young children? Why shouldn't established legal precedents embodying this public policy be applied to protect children from this form of exploitation? In short, why isn't such advertising unfair within the meaning of the Federal Trade Commission Act and, hence, unlawful?

> Moreover, children have become the target market for products that promise immediate satisfaction. With food, this often means instant pleasure and the danger of long term malnutrition. Children lack the judgment and experience to see that something that looks good to them in the short run can hurt them in the long run. They cannot protect themselves against adults who exploit their present-mindedness.
>
> * * * *
>
> Shouldn't society apply the law's strictures against commercial exploitation of children, and the law's solicitude for the health of children to ads that threaten to cause imminent harm--harm which ranges from increasing tooth decay and malnutrition to injecting unconscionable stress into the parent-child relationship?
>
> What I've talked about so far, the unfairness of advertising aimed at children, follows from the premise that children are not adults in miniature. Instead, they bring to advertising a special perspective and sensibility -- a credulousness that comes from inexperience -- which advertisers exploit . . . .
>
> . . . As I've already observed, there is scientific evidence that health problems may result from the use of sugared-products. Yet the

advertising of sugared products does not warn of potential dangers like tooth decay. Any child who has experienced the discomfort and pain of having a cavity filled would want this "material" information. (A-193 - A-195.)

* * * *

It may be that only a ban on the advertising of these products on programs directed towards the young child can remedy their inherent defect. . . . (A-196, emphasis added.)

Chairman Pertschuk's speech to Action for Children's Television reveals a great deal about his prejudgments of questions of fact involved in the children's advertising rulemaking. The speech demonstrated his prejudgments that it is the purpose and intent of advertisers to "manipulate" children and that television advertising does in fact "exploit" children; that children lack the capacity to understand the nature of advertising; and that such advertising is responsible for ailments ranging from malnutrition and tooth decay to "unconscionable stress" in parent-child relationships. It underscored his conclusions as to factual matters necessary to an ultimate determination that children's television advertising is "unfair" within the meaning of section 5 of the Federal Trade Commission Act, so that any future rulemaking could have as its

purpose no more than the production of evidence which he had previously determined supported his conclusions and the formulation of a remedy. As to the remedy appropriate to cure the "inherent defects" in advertising done in conjunction with programs aimed at young children, the speech made clear Chairman Pertschuk's belief that a ban on such advertising was preferable and possibly the minimum that would be sufficient.

3. Correspondence Following the Speech to Action for Children's Television

One day after his speech to Action for Children's Television, the Chairman distributed copies of that speech to a United States Senator, the Chairman of the Federal Communications Commission, and a member of the press. In each case, he attached a covering memorandum which indicated that the speech presented his factual conclusions or factual predeterminations necessary to constitute the legal underpinnings for an initiative which he characterized, in one memorandum, as a

> fundamental assault on television advertising directed toward young children (A-198),

and, in another, as

> decisive action by the Commission in areas of children's advertising abuses. (A-200.)

4. The Letter to Commissioner Kennedy

On November 17, 1977, Chairman Pertschuk wrote to Donald Kennedy, then Commissioner of the Food and Drug Administration. The body of that revealing letter is quoted in full below:

> Setting legal theory aside, the truth is that we've been drawn into this issue because of the conviction, which I know you share, that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional values. I see, at this point, our logical process as follows: children's advertising is inherently unfair. As a policy planning agency we have to make judgments as to our priorities. The first area in which we choose to act is an area in which a substantial controversy exists as to the health consequences of encouraging consumption of sugared products (not just cereals). With this formulation we do not have to prove the health consequences of sugared cereals. What we do have to prove is that there is a substantial health controversy regarding the health consequences of sugar -- a much lower burden of proof.
>
> I'm convinced that the convergence of public policies regarding the commercial exploitation of children with the health controversy over sugared products give us a stronger base and [sic] frankly deal directly with the underlying concerns which prompt our action. (A-206 - A-207, emphasis added.)

This letter and the other letters following the Chairman's speech to ACT not only reassert his "conviction" that "children's advertising is inherently unfair" -- a prejudgment of factual questions that condition determination of the ultimate issue at stake in the pending rulemaking -- but also reveal the Chairman's vigorous attempts to gain the support of other government officials and the public in his efforts to use the power of the Commission to wage a "fundamental assault on advertising directed toward young children." He is, in addition to seeking the support of his intended allies in this "assault", acting as its strategist or tactician by devising for the allied effort a "formulation [under which] we do not have to prove the health consequences of sugared cereals. What we do have to prove is that there is a substantial health controversy regarding the health consequences of sugar -- a much lower burden of proof.", coupled with an orchestration of political advocacy based on "the convergence of public policy regarding the commercial exploitation of children with the health controversy over sugared products."

5. The Wall Street Journal and Newsweek Articles

On December 28, 1977, the Wall Street Journal article, "FTC Staff Is Studying Ways To Shield Children From Exposure To TV Ads That It Finds Harmful" (A-208 - A-215), noted in particular the staff's theory that "TV advertising focused on [younger children] is unfair and a violation of the Federal Trade Commission Act." The article then stated:

> Without saying so directly, FTC Chairman Michael Pertschuk argued this line in a recent speech.

This reference was followed by numerous quotations from the Chairman's November 8, 1977 ACT speech.

The conclusion drawn by the Wall Street Journal from the Chairman's presentation was unequivocal:

> Although the commission's other members have been less outspoken, there are signs that Mr. Pertschuk can swing a majority and perhaps all of his colleagues behind the forthcoming staff proposals. (A-210.)

On January 30, 1978, Chairman Pertschuk was quoted in Newsweek (A-216 - A-220) as follows:

> Commercialization of children has crept upon us without scrutiny or

> action. It is a major, serious problem. I am committed to taking action. (A-217, emphasis added.)

The Chairman's "commit[ment] to taking action" was another assertion of his determination to use the Commission's powers to impose some restriction on advertising to children, leaving only the nature of the restriction to be determined in the course of the rule-making proceeding.

It is noteworthy that both the Wall Street Journal and Newsweek commented upon Chairman Pertschuk's remarks by likening him to an advocate of a rule. Thus, the Wall Street Journal revealed him as an effective proponent of the FTC staff proposals which advocate a ban on certain televised advertising to children. Similarly, Newsweek observed that both opponents and proponents of limitations of children's advertising are given to "highly charged rhetoric", and that the Chairman "leans toward equally strong words".

Thus, disinterested observers, in addition to the district court and Judge MacKinnon below, concluded that Chairman Pertschuk is far from an unbiased arbiter.

C. Proceedings Below and the Decision of the Court of Appeals

On May 8, 1978, petitioners lodged with Chairman Pertschuk a formal "Petition for Recusal" citing statements he

made during the preceding year as being indicative of his inability to participate impartially in the children's advertising rulemaking. Having received no response from Chairman Pertschuk, petitioners on May 18, 1978 addressed a similar motion to the full Commission. On July 13, 1978, Chairman Pertschuk responded to the May 8 petition, stating that his views on the pertinent issues were "tentative" and therefore did not require recusal. (A-120.) On July 18, 1978, the Commission, without the participation of Chairman Pertschuk or of Commissioner Pitofsky, who had previously recused himself, denied the May 18 motion. (A-112.)

Petitioners commenced this action on August 1, 1978 in the federal district court for the District of Columbia pursuant to 28 U.S.C. §§1331 and 2201. After oral argument on cross motions for summary judgment, the district court (Gerhard A. Gesell, J.) rendered its Judgment and Order on November 3, 1978. (A-100 - A-110.) Judge Gesell wrote:

> Upon examination of the Chairman's public statements and correspondence of record, a very substantial showing has been made that the Chairman has conclusively prejudged factual issues which will be disputed in the rulemaking proceeding and whose resolution will be necessary for a fair determination of the rulemaking as a whole. Going far beyond general observations of policy and

> tentative statements of attitude, the Chairman has by his use of conclusory statements of fact, his emotional use of derogatory terms and characterizations, and his affirmative efforts to propagate his settled views made his further participation improper . . . . Certainly, plaintiffs present such special facts and circumstances as to make the "risk of unfairness . . . intolerably high." (460 F. Supp. 996, 998, emphasis added; A-105 - A-107.)

Thus, the district court enjoined Chairman Pertschuk from further participation in the rulemaking.

The Commission appealed that ruling, and on December 27, 1979, by a vote of 2 to 1, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court. (A-1 - A-99.) Judge Tamm wrote a forty-eight page majority opinion, which was accompanied by a fourteen page concurring opinion by Judge Leventhal.* The majority held that:

> [a]n agency member may be disqualified from such a proceeding only

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*Judge Leventhal died after completion of his concurrence but before it was sent to the printer for publication; Judge Leventhal's opinion makes no mention of the dissenting opinion.

when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking. (Slip Op. at 3 - 4; A-3 - A-4.)

The opinion reasoned that the children's television inquiry was "a clear exercise of the Commission's rulemaking authority" rather than a "quasi-adjudicative" proceeding, and that the standard for disqualification of a Commission member set out in Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), is therefore not applicable. Judge Tamm wrote that the district court's characterization of section 18 rulemaking as a "hybrid" or "quasi-adjudicative" proceeding ignored the clear scheme of the Administrative Procedure Act, under which administrative action is either adjudication or rulemaking. The Court of Appeals viewed the procedures prescribed by section 18 as being rulemaking under this dichotomy because the "inquiry is designed to determine whether certain acts or practices will, in the future, be considered to contravene the FTC Act," and because the facts to be determined are "legislative".* The majority reasoned that "because legislative

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*Legislative facts were described, in the language of Professor Davis, as:

> . . . facts which help the tribunal determine the content of law and of

facts combine empirical observation with application of administrative expertise to reach generalized conclusions, they need not be developed through evidentiary hearings." (Slip. Op. at 18 - 21; A-18 - A-21.) The evidentiary hearing requirements of section 18 were therefore viewed as being helpful, but not necessary, in determining legislative facts in some circumstances. The congressional requirement for evidentiary hearings that is a part of procedure under 15 U.S.C. §57a does nothing, according to the majority, to transform the nature of the facts to be determined from legislative to quasi-adjudicative, and thus does nothing to require application of the Cinderella standard.

Judge MacKinnon concurred with the majority opinion insofar as it held "that affected parties are entitled to have substantive rules of the Federal Trade Commission prescribing specific and

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> policy and help the tribunal to exercise its judgment or discretion determining what course of action to take. (Slip Op. at 19; A-19.)

However, what is controlling here is the statutory prescription of "material fact . . . necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole." (15 U.S.C. §57a (e)(3)(B).)

unfair or deceptive acts or practices, promulgated by fair decision makers." (MacKinnon, Slip Op. at 1; A-63).* However, he strongly disagreed with the majority as to the standard by which prejudgment sufficient for disqualification should be determined:

> . . . the "unalterably closed mind," where it exists, in many cases is practically impossible to prove, imposes too high a barrier to the public's obtaining fair decision-makers and is a higher standard than the Supreme Court has applied in its recent decisions. I would require any Federal Trade Commissioner to recuse himself, or failing that to be disqualified, upon a showing by a preponderance of the evidence that he could not participate fairly in the formulation of the rule because of substantial bias or prejudgment with respect to any critical fact that must be resolved in such formulation.

After a detailed review of the Chairman's statements, Judge MacKinnon concluded that Chairman Pertschuk would have to be disqualified even if the majority's "unalterably closed mind"

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*Judge MacKinnon also concurred with the majority's view that petitioners were not required to exhaust the rulemaking process before filing a court challenge to disqualify a commissioner for bias. (Id.)

test were the appropriate standard. Judge MacKinnon found Chairman Pertschuk's posture on the issue of children's advertising to be so extreme that if the Notice of Rulemaking were to be truthful, so far as the Chairman's views are concerned, it would have to state:

> The Commission has decided to make a fundamental assault upon Children's Advertising on TV because we are convinced that it is evil, unfair and allowed solely because of the moral myopia of the public and the industry. We solicit comments as to whether it should be prohibited entirely or to some lesser degree. (MacKinnon, Slip Op. at 25; A-87.)

D. Chairman Pertschuk's Announcement of Voluntary Withdrawal

By statement dated January 7, 1980 (A-221) Chairman Pertschuk announced that he was withdrawing from further participation in the children's advertising rulemaking. Citing the Court of Appeals' decision in this action as having confirmed "the lawfulness and appropriateness of [his] participation in this proceeding," Chairman Pertschuk explained that his voluntary recusal was intended to eliminate a provocative element during current congressional consideration of legislation intended to constrict the Commission's rulemaking authority. In the statement, Chairman Pertschuk once again denied any personal prejudgment sufficient to disqualify him under

the "unalterably closed mind" standard set out by the Court of Appeals.

Reasons For Granting The Writ

1. The Court of Appeals has Established a Shocking and Indefensible Precedent for Non-disqualification of Federal Trade Commission Decision-makers

The Court of Appeals has held that a Commissioner of the Federal Trade Commission cannot be disqualified for bias or prejudgment from participation in the children's advertising proceeding except upon a virtually impossible "clear and convincing showing" of an "unalterably closed mind" on matters "critical" to the proceeding. Such a standard not only contravenes the language and intent of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2193, 15 U.S.C. §57a (1975), but conflicts with the principles underlying past decisions of this Court and other courts.

The Court of Appeals' holding cannot be allowed to stand unreviewed by this Court. In the absence of this Court's evaluation, the Court of Appeals' judgment will stand as governance for the District of Columbia judiciary, which handles so large a volume of the nation's administrative agency jurisprudence, as well as guidance for other district and circuit courts.

The Magnuson-Moss Amendments' assurance of a "fair determination . . . of the rulemaking proceeding," 15 U.S.C. §57a(e)(3)(B), FTCA §18a(e)(3)(B), will inevitably be frustrated by participation of an unfair arbiter, which is the only possible characterization of one, such as Chairman Pertschuk, whose record of prejudgments is indisputable.* Congress surely did not intend to entrust determination of critical fact issues in section 18 rulemaking proceedings to Commissioners who are advocates, and even planners of strategy, for a given outcome, or who must first be pried away from strongly held biases and publicly stated prejudgments before they can

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*Nowhere in its decision does the Court of Appeals refute or even challenge the correctness of Judge Gesell's finding that Chairman Pertschuk had "conclusively prejudged" factual issues. The Court of Appeals does not discriminate between "conclusively" and "unalterably", and never concludes with regard thereto that it is "left with the definite and firm conviction that a mistake has been committed", United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), which it must do even where, as here, a district court's findings are inferred from documents or undisputed facts. 333 U.S. at 394; Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB, 547 F.2d 575 (D.C. Cir. 1976); Fed. R. Civ. P. 52(a).

even begin to weigh the rulemaking evidence impartially. The practical impossibility of making a "clear and convincing showing" of unalterability is itself a denial of the "fairness" Congress intended.

Congress has not delegated its legislative powers to the FTC under FTCA §18 so generously as to elevate the Commissioners to the status of legislators, with equivalent freedom to participate in and decide trade regulation rulemaking proceedings despite bias and prejudgment on their part as to material issues of fact. Participation of so biased a Commissioner can do nothing but besmirch the appearance of administrative fairness that Congress has been solicitous to preserve and thereby destroy public confidence in such proceedings.

The actuality, or even merely the appearance, of such bias and prejudgment on the part of Chairman Pertschuk, as he manifested by his public and private statements (A-170 - A-220) and dissenting opinion below of Judge MacKinnon, Slip Op. at 17-25) flouts the congressional intent that FTCA §18 trade regulation rulemaking would incorporate adequate "safeguards" of the "integrity" of the process (H.R. Rep. No. 93-1107, June 13, 1974, 93rd Cong., 2nd Sess., 33, 45-46 (1974)) and the more general solicitude of Congress that administrative agency proceedings should enjoy public

confidence.* That is all the more so where, as here, the Chairman's participation and influence has already been attended by such formulation and conduct of the rulemaking proceeding as to impress the district court that it has been "rigged", Chocolate Manufacturers Association of the United States of America, Inc. v. FTC, Dkt. 78-1372, Tr. 117 (D.D.C. Nov. 17, 1978), and a different panel of the same Court of Appeals that it "is window dressing for the benefit of a court passing on a final trade regulation rule that was in stock long

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*"Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commission render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalization of the preliminary findings which the Commission, in the role of prosecutor, presented to itself." Senate Judiciary Committee, Report on the Administrative Procedure Act (S. Rep. No. 752, 79th Cong., 1st Sess. (1945)), quoting with approval from the 1937 Report of the President's Committee on Administrative Management, pp. 39-40, (emphasis added).

before its tentative models were displayed in the children's advertising Notice . . . . [S]ome of the Commission's activities at least suggest that it long ago settled on what it had in mind and deliberately fashioned its special rules to achieve that result with the fewest possible outside intrusions from precisely the parties Congress intended to have participate in a proceeding of this kind." Association of National Advertisers, et al. v. FTC, __F.2d__, 1979-2 Tr. cases (CCH) ¶62,950 at 79,398 (D.C. Cir. 1979). In addition, as the record in this case demonstrates, such participation can have a dire effect upon the reality of fairness in a proceeding affecting major segments of our society and economy.

2. The Disqualification Standard Announced by the Court of Appeals Conflicts with the Principles of Prior Decisions of this and Other Courts

That citizens involved in an administrative proceeding "have a constitutional right to a fair and impartial hearing" is a fundamental concept, only recently restated by this Court. Friedman v. Rogers, 440 U.S. 1, 18 (1979). As more particularly stated by Justice Brandeis, "The inexorable safeguard which the due process clause assures is . . . that the trier of facts shall be an impartial tribunal." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73 (1936). See also Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

The purpose of a trade regulation rule proceeding, as stated in section 18 of the FTCA, is to "define with specificity acts or practices which are unfair or deceptive." In a letter to Food and Drug Commissioner Donald Kennedy, Chairman Pertschuk expressed the "conviction . . . that one of the evils flowing from the unfairness of children's advertising is the resulting distortion of children's perceptions of nutritional values" and that "children's advertising is inherently unfair." (A-206.) Obviously, these statements reveal final prejudgment of the ultimate issue involved in the administrative proceeding. Professor Antonin Scalia, the former Chairman of the Administrative Conference of the United States, an independent and expert observer, has written: " . . . it is admittedly difficult to recall so vigorous an expression of prejudgment in a pending proceeding." Scalia, Vermont Yankee: the APA, the D.C. Circuit and the Supreme Court, 1978 Sup. Ct. Rev. 345, 408-09 n. 255.

As Judge MacKinnon so ably points out, the majority has misinterpreted and misapplied the past decision of this court in Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948). That case did not involve extra-official prejudgment by a single member of the Commission of specific factual issues to be decided in a pending or ongoing proceeding. Rather, it involved alleged prejudgment and disqualification of the entire Commission as a consequence of

prior offical acts required by law. The prior reports of the Commission in Cement Institute contained conclusions of law formed in separate proceedings conducted pursuant to statutory authority. With respect to them this Court said:

> If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. 333 U.S. at 702.

The court below also misapplied Hortonsville Joint School Dist. No. 1 v. Hortonsville Education Association, 426 U.S. 482 (1976). There, the question before the Court was whether a school board was disqualifed from holding disciplinary hearings and subsequently terminating the employment of teachers who had engaged in an illegal strike. The Wisconsin Supreme Court had found that the disciplinary proceedings violated the Due Process Clause, basing its decision solely upon the fact ". . . that the School Board was involved in the negotiations that preceded and precipitated the striking teachers' discharge." (Id. at 492.) The Supreme Court reversed and pointed out that the state court had held " . . . that state law prohibited the strike and that termination of the striking teachers' employment

was within the Board's statutory authority." (Id. at 488.) In this Court's view, "the only decision remaining for the Board, therefore, involved the exercise of its discretion as to what should be done to carry out the duties of the law placed on the Board." (Id.) The decision to terminate the strikers " . . . was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy . . . ." (Id. at 495, emphasis added.)

As a precedent for this case Hortonsville has the same obvious weaknesses as Cement Institute. Here again, an entire decision-making body had been erroneously disqualified solely because its statutory duties had forced it to become familiar with and take prior actions related to the same subject matter. The Supreme Court summed up its holding as follows:

> Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decision makers as a matter of federal due process. A showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in

policy makers with decision making power. (Id. at 496-97.)

Withrow v. Larkin, 421 U.S. 35 (1975), is equally inapposite, for that case involved only the allegation that a combination of investigative and adjudicative functions in the same tribunal is violative of due process. This court held that such a combination "does not, without more, constitute a due process violation" (Id. at 58) and, in marked contrast to this case, that "[n]o specific foundation has been presented for suspecting that the Board has been prejudiced . . .". (Id. at 55.)

It is ironic that the court below, in an earlier decision disqualifying a single member of the Securities and Exchange Commission correctly distinguished the Cement Institute case as presenting a "'rule of necessity' situation", Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 267 n. 12 (1962); yet it now cites Cement Institute as its foundation for the "unalterably closed mind" test for disqualification.

A fundamental defect in the decision below is the complete absence of any consideration of the effect of its ruling upon public confidence in the fairness of administrative proceedings. In past decisions the court below repeatedly emphasized that administrative proceedings must not only be fair but they must also have the "very appearance of complete

fairness." Amos Treat & Co., supra at 267; Texaco, Inc. v. FTC, 336 F.2d 754, 760 (1964), vacated on other grounds, 381 U.S. 739 (1965). Significantly, when the majority below refers to the "test" it employed in the Cinderella case (Slip Op. at 12; A-12), it referred to only part of the test upon which the district court founded its decision. The omitted half of the Cinderella test, quoting Amos Treat, provides:

> [A]n administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness." 425 F.2d at 591.

The Sixth Circuit has also employed the "appearance" test to disqualify an FTC Commissioner. In American Cyanamid Co. v. FTC, 363 F.2d 757, 767 (1966), that court concluded:

> It is fundmental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.

Long ago, in Morgan v. United States, 304 U.S. 1, 22 (1938), this Court prescribed the principle which should govern administrative agencies in carrying out their functions:

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-

judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

It is clear that the decision below improperly subverts "basic concepts of fair play" through a rigid "unalterably closed mind" formula, for, as Justice Frankfurter, concurring, wrote in Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951):

> The requirement of "due process" is not a fair-weather or timid assurance . . . . [It] is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula . . . . Due process is not a mechanical instrument. It

> is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Furthermore, given the substantial similarities between proceedings under FTCA §5(b) and §18(b)-(e) (including, e.g., notice of subject of proceeding, and proposed rule; the mandate for a hearing and a transcript thereof; opportunity for interested persons to present positions in writing and/or in person, including such cross-examination and rebuttal as is necessary for fair determination of material fact issues; the requirement of "fairness" itself; application of the "substantial evidence" standard on judicial review; and the legal effects of the outcome), there is clear conflict between the Court of Appeals' decision below and the holdings of Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970), American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), and Texaco, Inc. v. FTC, 336 F.2d. 754 (D.C. Cir. 1964), vacated and remanded on other grounds, 381 U.S. 739 (1965).

The principles and holdings of these prior cases establish that a commissioner of the Federal Trade Commission must be disqualified from participating in a proceeding under FTCA §5(b) where he is biased or has a prejudgment, or even has but given the appearance thereof, as to the resolution of material issues

of fact involved therein. The "appearance of fairness" test, or some similar standard, should likewise apply to a proceeding under FTCA §§18(a)(1)(B) and 18(b)-(e), in which it is required, inter alia, that the Commission make a "fair determination" of "material facts" based upon "substantial evidence in the rulemaking record . . . taken as a whole" after allowing such "cross-examination [and] rebuttal submissions" as are "necessary for [such] fair determination." The statute cannot contemplate that "fair determination[s]" do not require fair arbiters.

It is desirable that there be set to rest, with the finality that only the Supreme Court can provide, whether there is, indeed, such a conflict. If there is, then there should be decided, with like finality, how it should be resolved: whether the Cinderella rule or some other standard applies to trade regulation rulemaking proceedings.

3. The Public Importance of a Proper Disqualification Standard Warrants Review by this Court

If left unreviewed, the law of the land will likely be molded within the matrix of the Court of Appeals' decision, one of first impression by a divided court: that an FTC commissioner, unable to participate and influence--perhaps control--a decision binding upon the nation as a whole by means of FTCA §§5(b) and 5(m)(1)(B) because of bias and prejudgment regarding the matter, could

nonetheless participate in and influence --perhaps control--exactly the same decision with exactly the same regulatory results on exactly the same evidence and facts if only the underlying proceeding is changed from one under section 5(b) to one under sections 18(a)(1)(B) and 18(b)-(e).

Considering the impact of such an anomalous result on industry, consumers and the public's image of the integrity of the Commission's trade regulation rulemaking function, imposition of the "unalterably closed mind" standard should be evaluated by the highest court of the land and should not be pronounced by only two judges of a Court of Appeals.

The resultant clarification will be of inestimable importance:

> to the Commission itself, with its pending calendar of 14 trade regulation rulemaking proceedings (4 Trade Reg. Rep. ¶38,002) and, in all likelihood, more to come, as well as to those persons who are or will be interested in such proceedings;
>
> to Congress, which is even now actively interested and engaged in prospective legislation regarding the FTC's rulemaking powers (e.g., S. 1991, H.R. 2313);
>
> to other courts presented with similar questions;

to the integrity of, and public confidence in and respect for the rulemaking process itself.

Chairman Pertschuk's Voluntary Withdrawal Does Not Moot This Case

Chairman Pertschuk's sua sponte withdrawal from the children's advertising rulemaking barely eleven days after the judgment of the Court of Appeals does not moot petitioners' cause of action and preclude issuance of a writ of certiorari. Under the well-recognized parameters of the mootness doctrine, this Court retains jurisdiction to hear this case because Chairman Pertschuk's withdrawal under a claim of right is a "voluntary cessation of allegedly wrongful acts." United States v. W. T. Grant Co., 345 U.S. 629 (1953).

Mere voluntary cessation of allegedly unlawful activity does not moot a cause of action where "the defendant is free to return to his old ways." Id. at 632; United States v. Trans-Missouri Freight Association, 166 U.S. 290, 308 (1897); Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944). See, Allee v. Medrano, 416 U.S. 802, 810 (1974); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). The Chairman's statement announcing his withdrawal declares that his recusal was motivated exclusively by the political expediency of removing from congressional debate the "diversionary issue" of his

further participation in the rulemaking. (A-221 - A-224.) He expresses no concern for the rights of petitioners or the integrity of the administrative process.*

However, the congressional debate over the children's advertising rulemaking is necessarily a transitory occurrence. When the debate has been completed, Chairman Pertschuk will no longer have to consider the circumstances which motivated his withdrawal. Circumstances at that time might prompt him to resume participation, which in the absence of further review of the Court of Appeals' decision, he will be free to do.** Indeed, it appears he will consider it an obligation to do so, for his

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*Chairman Pertschuk's voluntary withdrawal occurred when the possibility was strong that petitioners would petition this Court or the Court of Appeals for further review of the decision of December 27, 1979. Such voluntary cessation in the face of further litigation has been described as "equivocal in purpose, motive and permanence." Jenkins v. United Gas Corporation, 400 F.2d 28, 33 (5th Cir. 1968).

**For example, if one of the remaining eligible Commissioners were for any reason unable to continue participating in this rulemaking, completion of the rulemaking would be impossible for lack of a quorum. Under such circumstances, Chairman

statement predictably asserts: "I believe an agency member has a duty to sit in every proceeding which comes before the agency, unless compelling circumstances exist. Unfortunately, uniquely compelling circumstances do exist, here and now." (A-223, emphasis added.)

In Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944), this Court found that "an actual controversy and adverse interests" continued to exist when a defendant ceased the contested activity while urging, as Chairman Pertschuk has done, the legal validity of that activity. The Court indicated that a controversy between the parties over the legality of defendant's activity remained, and that the defendant's claim of right was itself indicative of a likelihood of recurrence of the alleged wrongs. Similarly, a claim by defendants that their activity was "perfectly proper, legitimate and salutory" was cited by this Court as a basis for rejecting an allegation of mootness in United States v. Trans-Missouri Freight Association, 166 U.S. at 308.

The importance of the public law issue presented in this case strongly militates against a finding of mootness.

Pertschuk might well be expected to resume participation in a rulemaking about which he "care[s] deeply" and believes to be of "profound importance." (A-224.)

The proper use of the Federal Trade Commission's rulemaking power is an issue of enormous importance to the American public and the American economy. Chairman Pertschuk's past abuse of that power ought not to escape judicial review merely because he has voluntarily withdrawn temporarily from the children's advertising rulemaking. His publicly stated belief in the propriety of the sort of political advocacy and prejudgment of issues of critical fact which he has exhibited in this rulemaking indicate beyond any doubt that important issues need to be addressed by this Court. It is in the best interest of the public as well as petitioners to have these principles settled before there is further abuse of the Commission's power in this or subsequent rulemakings.

While petitioners submit that this case is not moot, in the event this Court determines otherwise, petitioners respectfully request that the judgment of the Court of Appeals be vacated and the case remanded for dismissal of the action as moot. United Sates v. Munsingwear, 340 U.S. 36, 39 (1950).

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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